Supreme Court, U.S.
FILED
MAR - 6 1995
CLERK OF THE SUPREME COURT

(3)

No. 94-1326

In the

Supreme Court of the United States

October Term, 1994

CENTER FOR AUTO SAFETY,
Petitioner,

v.

JOHN T. WILLIS, Secretary of State of Maryland,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals correctly hold that an annual registration fee imposed by a Maryland statute designed to regulate charities and to protect citizens from charitable fraud does not violate the Commerce Clause because (a) the fee is calculated to defray the State's costs of regulating charitable organizations in Maryland by apportioning those costs to charities on the basis of the workload they generate, (b) the fee does not discriminate against interstate commerce, and (c) the total fees raised are less than the State's cost of administering and enforcing the statute?

2. Did the Court of Appeals properly find that the Maryland registration fee does not violate the First Amendment because the fee is content-neutral and is narrowly tailored to match the State's costs in implementing the statute?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

1. Proceedings below.

Petitioner Center for Auto Safety, Inc. ("CAS") initiated this action in the United States District Court for the District of Maryland seeking injunctive and declaratory relief against the Maryland Secretary of State (the "Secretary" or "State"). CAS claimed its rights under the First Amendment, the Due Process Clause of the Fourteenth Amendment, and the Commerce Clause were violated by the registration fee provision set forth in

the Maryland Charitable Organization Solicitations statute providing that non-exempt charities intending to solicit donations from Maryland residents must pay a sliding-scale fee based on their nationwide level of public contributions. Following discovery and extensive briefing on cross-motions for summary judgment, the district court held that the law is constitutional and entered summary judgment in favor of the State. On appeal, the Fourth Circuit affirmed. The petition to this Court followed.[1]

2. The Statutory Scheme.

Maryland's Charitable Organization Solicitations statute, formerly set forth in Md. Code Ann. Art. 41, §§ 3-201 - 3-219 (1991), and presently found in Md. Bus. Reg. Code Ann. §§ 6-101 - 6-701 (1992 and 1994 Cum. Supp.), imposes a number of restrictions on charitable organizations seeking to solicit funds within the State.[2] These restrictions are designed to protect the general public from charitable fraud. The statute requires every non-exempt charitable organization that intends to solicit funds in the State to file with the Secretary a detailed registration statement and annual reports for each subsequent year in which the charity engages in this activity. *See* Md. Code Ann. Art. 41, § 3-202(a). The registration statement and annual reports must be accompanied by either an independent certified public accountant's review of the charity's financial information if the charity's public contributions equal or exceed

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[1] Pursuant to Sup.Ct.R. 35.3, the current Secretary of State is substituted as the respondent in this case.

[2] CAS brought suit prior to the recodification of the State's charitable solicitations statute. The statutory provision at issue here was recodified without any substantive change.

$100,000 and are less than $250,000, or an audit if the total contributions equal or exceed $250,000. § 3-202(b)(1), (b)(2), (e)(1).

The statute imposes a number of other responsibilities on charitable organizations, *see, e.g.*, § 3-204 (regulating contents and filing of contracts with fundraising counsel or professional solicitors); § 3-205 (activity limitations and disclosure requirements); § 3-210 (maintenance of records); § 3-212 (prohibited acts and practices), and vests the Secretary of State with investigatory, enforcement, and emergency powers, including the authority to cancel and annul a charity's registration, to issue summarily cease and desist orders, to take emergency action, and to refer cases to the Maryland Attorney General for civil and criminal prosecution. *See* § 3-214.

Prior to 1985, Maryland law required charities to register annually and to pay a flat fee of $25 each year. *See* Md. Ann. Code Art. 41, § 103B(c) (1982 Repl. Vol.). In 1985, the annual fee was eliminated when the law changed from annual registration to a one-time registration fee of $50 with annual renewals at no additional expense. *See* 1985 Md. Laws, ch. 117. However, by 1989, the Secretary of State's office determined that the payment of a one-time flat fee of $50 by all charities did not begin to defray the actual costs of administering and monitoring charitable organizations in Maryland. For example, prior to the State's 1989 legislative session, the Secretary of State determined that under this scheme his office received registration fees for 1987 that were well below his office's costs of administering and enforcing the Charitable Organization Solicitations statute. (App. 18a.) Thus, in January 1989, the Secretary sponsored legislation to reinstate the annual

fee requirement to help offset the administrative costs of the annual renewal process, and to replace the flat fee system with a sliding-scale fee based on the total contributions that a charity received in the prior year. (App. 2a.)

Under the proposed amendment, charities with at least $25,000 but less than $50,001 in public contributions were to pay a $50 fee; charities with at least $50,001 but less than $75,001 in public contributions were to pay a $75 fee; charities with at least $75,001 but less than $100,001 in contributions were to pay a $100 fee; and charities with contributions of $100,001 and above were to pay a $200 fee. The Secretary also proposed that a charity with less than $25,000 in public contributions not be required to pay an annual fee unless it uses the services of a professional solicitor, in which case it would be required to pay an annual fee of $50. (App. 4a; § 3-202(g)).

In submitting the proposed legislation to the Governor's office for review prior to the 1989 legislative session, the Secretary of State's office explained the legislation's purpose and justified the sliding-scale fee, stating that "the moneys raised would approximate the cost of administering and enforcing the charitable organizations law." (App. 18a.) That estimation was based on the research that the Secretary's office conducted at the time. The Secretary's decision to propose legislation to raise the registration fees came about as a result of the experience of the Secretary's office that larger charities generate more expenses in terms of reviewing paperwork, responding to inquiries from the public, and conducting other enforcement activity. (App. 8a-10a and n.8; 19a-20a and n.4.)

The legislature enacted the fee schedule the Secretary proposed. *See* 1989 Md. Laws, ch. 388. The proposed legislation was also amended to provide for the creation of a Charitable Giving Information Program. The increased fees generated by the new fee scale were to be used to fund in part this new public service. Moreover, to ensure that the increased fees would result in increased service to the giving public, the legislation was amended further to require the Governor to include in every budget commencing with the State's 1991 Fiscal Year funds for the Program "which are equal to or greater than one-half of the amount of fees collected during the preceding fiscal year. . . ." 1989 Md. Laws, ch. 388, § 3. Thus, the Legislature declared its intention that the fees paid by charities would be used for charities and the public they solicit.

3. Decisions Below.

CAS is a non-profit consumer advocacy organization incorporated in Washington, D.C., whose activities include, among other things, engaging in direct-mail solicitations to non-members. It estimates that it sends out approximately 200,000 to 250,000 mailings on an annual basis, including 15,000 solicitation items to non-member Maryland residents. It also estimates that it sends direct mailings to its approximate 8,500 existing members, of whom approximately 500 live in Maryland. CAS receives total annual contributions in excess of $100,001 and thus must pay an annual fee of $200 to solicit contributions in Maryland. After refusing to pay the $200 fee for its fiscal year ending June 30, 1991, CAS initiated this action in the United States District Court for the District of Maryland, claiming that the statutory fee violates CAS's rights under the First Amendment, the Due Process Clause of the Fourteenth

Amendment, and the Commerce Clause.

Following discovery, the district court ruled on the parties' cross-motions for summary judgment and upheld the constitutionality of the challenged law. The district court rejected CAS's First Amendment claim, finding that "(i) the fee provision of the Solicitation Law was proposed and passed with the intent and justification that it would cover the expenses of administering the law, (ii) the fees involved raise part of, but do not exceed, the costs of administering the Solicitation Law, and (iii) the distinction between the fees for larger and smaller organizations is sufficiently tailored to the amount of work and expense required by the State to monitor and respond to inquiries relating to the organization in question." (App. 20a-21a.) The district court also found no merit in CAS's Commerce Clause claim, finding that the Secretary "has sufficiently established the nexus between the fees charged and the cost of operating the program, and has justified the varying fees by cost per level of fundraising, to establish that the fee is indeed not a tax but a user fee designed to fund a program that protects the state's citizens and benefits the charities subject to its provisions." (App. 21a-22a.) The court also dismissed CAS's due process claim. (App. 23a.)

On appeal, CAS raised only its Commerce Clause and First Amendment claims. The Fourth Circuit affirmed. Finding that "the record clearly shows that the Secretary's costs of monitoring charities increase with larger charities" and that "a charity's fee is directly related to the workload the charity is expected to create for the Secretary" (App. 8a), the Court of Appeals held that the registration fee satisfies the three-prong test set forth in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707, 717-20 (1972), and does

not violate the Commerce Clause. The court held that the fee represents a fair approximation of the Secretary's costs of administering and enforcing the State's Charitable Organization Solicitations statute, the fee does not discriminate against interstate commerce, and the total amount of fees raised is less than the State's administration and enforcement costs. (App. 8a-9a.) The Fourth Circuit rejected CAS's contention that the fee does not constitute a "user fee", stating that charities registered in the State both use and benefit from the State's regulatory mechanism overseeing the activities of charitable organizations. (App.9a-10a.)

The Fourth Circuit also held that the fee does not violate the First Amendment "because the Statute's sliding scale is narrowly tailored to match the costs incurred by Maryland in implementing the Statute, because the Secretary does not exercise discretion in the imposition of the fee, and because the fees imposed are content-neutral and do not unduly burden speech. . . ." (App. 14a.)

REASONS FOR DENYING THE WRIT

THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

Further review of this case is unwarranted because the decision below rests on a factually based determination that conforms with prior decisions of this Court and similar decisions of other federal courts. Both courts below found, based on undisputed evidence contained in the record, that Maryland's registration fee is designed to defray part of the State's costs of registering and monitoring charitable organizations by reasonably and fairly apportioning those costs to charities on the basis of the workload they generate. The lower

courts' resolution of those facts gives rise to no error that justifies the exercise of this Court's discretionary jurisdiction. This Court has recognized repeatedly that a State is entitled under the Commerce Clause to impose fees to cover such costs as long as the fees reflect a fair approximation of and do not exceed the State's costs, and provided further that the fees do not discriminate against interstate commerce. The Fourth Circuit decided no novel or unsettled questions of federal law in finding that Maryland's registration fee satisfies this test. Nor did the court below decide this case in a way that conflicts with this Court's First Amendment decisions, which have sanctioned the content-neutral imposition of fees as a means of offsetting a State's costs of regulating First Amendment activities.

Simply put, the petition fails to identify any issue on which the lower federal courts require this Court's guidance. Indeed, despite petitioner's assertion that other states have implemented statutes similar to Maryland's, no other federal appellate court has even addressed, much less decided, a challenge to one of those statutes. The petition should be denied, therefore, because this case presents no issue warranting this Court's review.

I. THE FOURTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S COMMERCE CLAUSE CASES.

CAS concedes "Maryland's registration fee . . . was intended to provide financial support for the state's policing and regulation of charities." (Pet. at 14.) This Court has repeatedly held that the imposition of fees designed to offset specific costs of state regulation, "although termed a tax, cannot be tested by standards which generally determine the validity of taxes." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609,

622 n.12 (1981) (quotations and citation omitted). Because the fees challenged here constitute "a supervisory and not a fiscal measure," *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 210 (1944), the "State may impose non-discriminatory regulations on those engaged in foreign commerce 'for the purpose of insuring the public safety and convenience; * * * a license fee no greater in amount than is reasonably required to defray the expense of administering the regulations may be demanded.'" *Id.* at 211-212 (citation omitted). *See also Duckworth v. Arkansas*, 314 U.S. 390, 396 (1941).

Where, as here, "charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services," this Court has "required a showing, based on factual evidence in the record, that 'the fees charged do not appear to be manifestly disproportionate to the services rendered. . . .'" *Commonwealth Edison Co. v. Montana*, 453 U.S. at 622 n.12 (*quoting Clark v. Paul Gray, Inc.*, 306 U.S. 583, 599 (1939)). Carefully resting their rulings on the undisputed facts in this record, both courts below found that Maryland's sliding-scale registration fee satisfies the criteria set forth in a long line of this Court's decisions, which provide that if the fee "is based on some fair approximation of use or privilege for use . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users." *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. at 716-717. *See also Northwest Airlines, Inc. v. Kent County*, 114 S.Ct. 855, 864 (1994); *United States v. Sperry Corp.*, 493 U.S. 52, 60-64 (1989); *Massachusetts v. United States*, 435 U.S.

444, 460-467 (1978); *Union Brokerage Co. v. Jensen*, 322 U.S. at 209-212; *Duckworth v. Arkansas*, 314 U.S. at 396.[3] The courts below decided no exceptional questions of federal law in conducting the fact-intensive inquiry called for in these cases.

CAS contends that the Fourth Circuit's application of the "user fee" analysis set forth in these cases is "unprecedented" because CAS and other charities "do not 'use' any state-owned or state-operated facilities in their solicitations." (Pet. at 11, 16.)[4] The Fourth Circuit's rejection of this argument is fully in accord with this Court's user fee cases and gives rise to no issue warranting this Court's further review.

The Court of Appeals stated that, like users "of state facilities such as roads, highways, and airports", "charities seeking to solicit in Maryland use the state's apparatus for regulating charities. . . ." (App. 9a.) The court found that this regulatory mechanism imposes substantial costs upon the State in the "collection and review of registration and financial information of charities seeking to solicit in Maryland" (*id.* n.8), and

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[3] There is no merit in CAS's assertion that the Fourth Circuit "[r]ecogniz[ed] that the Maryland fee could not survive the rigorous *Complete Auto Transit*[, *Inc. v. Brady*, 430 U.S. 274 (1977),] analysis. . . ." (Pet. at 14.) Rather, the Court of Appeals simply stated that given its analysis of the Maryland statute under the test set forth in the *Evansville-Vanderburgh* line of cases, "it is not necessary to consider whether the fee could also be justified as a general revenue tax under other case authority." (App. 9a n.7.)

[4] As the Fourth Circuit noted, CAS below also disputed that "*Evansville-Vanderburgh* is still valid, binding precedent." (App. 7a n.6.) CAS no longer makes that argument.

because "[t]he Secretary of State's office also responds to telephone and written inquiries regarding charities, conducts public education lectures, and investigates complaints about charities." (App. 9a-10a n.8.) Agreeing with the district court, the Fourth Circuit stated the record in this case "clearly shows" that these costs increase with larger charities "because larger charities generally generate more registration and renewal documents to review, require more research relating to administrative, management, and membership activities, and give rise to more public inquiries, more paperwork requiring data entry, and more investigative effort." (App. 8a.) (*See also* App. 19a-20a and n.4 (district court decision).)[5]

The Court of Appeals found that these regulatory efforts not only "provide a service to the citizenry of Maryland, they also benefit charities seeking to solicit in

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[5] CAS is the prototype "large" charity that generates more work for the Secretary of State. As the Fourth Circuit observed, CAS annually sends approximately 200,000 to 250,000 mailings nationwide, including 15,000 mailings to Maryland residents. (App. 14a.) While CAS's complaint labeled these mailings as "prospect mail", CAS also annually sends an additional unspecified number of mailings to each of its approximately 8,500 members, including its 500 Maryland members. Maryland law requires all charities registered in the State to include on their written solicitations and receipts a disclosure statement that information about the charity is available from the Maryland Secretary of State. Because CAS engages in high volume in-state and out-of-state solicitation activity, it generates more inquiries for the State to respond to and more investigative work for the State to conduct. In addition, because CAS's annual public contributions exceed $100,000, it is required under Maryland's statute to file more detailed registration materials and annual reports, including a CPA review or audit, for the State to review.

Maryland by eliminating illegitimate charities and enhancing public confidence in charities." (App. 10a n.9.) The Fourth Circuit properly held that the State is constitutionally allowed to require CAS to pay its fair share of the State's costs in providing these benefits. *See United States v. Sperry Corp.*, 493 U.S. at 64 ("The Tribunal made available to claimants such as Sperry sufficient benefits to justify the imposition of a reasonable user fee.").

Contrary to CAS's contention, there is nothing legally remarkable about the Court of Appeals' finding that this case "fits comfortably within the user fee category" (App. 9a), as "charges levied by state authority to defray the cost *of regulation or of facilities* afforded in aid of interstate or foreign commerce have consistently been held to be permissible." *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 267 (1935) (emphasis added). Governmental supervision "imposes costs upon the State which those who are supervised must, as is often the case, themselves pay." *Union Brokerage Co. v. Jensen*, 322 U.S. at 210-211. Thus, just as a State may impose a fee to offset costs arising out of "the use of state-owned or state-provided transportation or other facilities and services," *Commonwealth Edison Co. v. Montana*, 453 U.S. at 621, a State that incurs expenses in the enforcement of "local regulations designed to safeguard the states from injurious local effects", *Duckworth v. Arkansas*, 314 U.S. at 395, is also entitled to recover "the costs of administration and policing" these regulations. *Clark v. Paul Gray, Inc.*, 306 U.S. at 599. CAS is just wrong, therefore, in contending this Court's user fee cases are inapplicable here.

Applying the analysis set forth in those cases to the

undisputed facts in the record, the Court of Appeals properly concluded that the State's registration fee does not violate the Commerce Clause. First, the Fourth Circuit found that "because a charity's fee is directly related to the workload the charity is expected to create for the Secretary, the sliding scale fee is a fair, if imperfect, approximation of Maryland's costs, thus satisfying the first prong of the *Evansville-Vanderburgh* test." (App. 8a.) *Accord United States v. Sperry*, 493 U.S. at 60 ("All that we have required is that the user fee be a 'fair approximation of the cost of benefits supplied.'") (*quoting Massachusetts v. United States*, 435 U.S. at 463 n.19). The Court of Appeals next held that "Maryland's sliding scale fee does not discriminate against interstate commerce. The fee imposed does not differentiate between Maryland-based charities and charities based out-of-state." (App. 8a.)[6] Finally, in finding the fees are not "excessive in relation to the costs incurred by Maryland" (App. 9a), the Fourth Circuit observed "[t]he parties do not dispute that the total amount raised through registration fees did not exceed the funds necessary to cover Maryland's administration and enforcement of the Statute." (*Id.*)

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[6] CAS presented no evidence below and made "no showing of any inherent difference between these classes of [charities], such that the application of the same fee to both would amount to discrimination against one or the other." *Evansville-Vanderburgh*, 405 U.S. at 717. Nor does it make any such claim of discrimination here. On the contrary, while CAS contends that the State is unable to satisfy the first, second, and fourth prongs of the *Complete Auto Transit* test, CAS is completely silent with respect to the third prong of that test, which requires that the disputed fee "not discriminate against interstate commerce . . . ." (Pet. at 13) (*quoting Complete Auto Transit*, 430 U.S. at 279).

These findings are supported by undisputed evidence in the record and give rise to no issue warranting this Court's review. They also refute petitioner's assertion (Pet. at 18) that the Fourth Circuit's analysis conflicts with *American Trucking Associations v. Scheiner*, 483 U.S. 266 (1987). *Scheiner* held only that the Pennsylvania road taxes at issue in that case could not be justified using the three-prong user fee analysis discussed above and set forth in *Evansville-Vanderburgh* because unlike the fee in the latter case, "Pennsylvania's flat taxes satisfy neither of these conditions: They discriminate against out-of-state vehicles by subjecting them to a much higher charge per mile traveled in the State, and they do not even purport to approximate fairly the cost or value of the use of Pennsylvania's roads." 483 U.S. at 290. In contrast to the road taxes in *Scheiner*, the fee in this case is subject to no comparable claim that it discriminates against out-of-state charities, nor could it be since its focus on nationwide contributions is facially neutral and CAS presented no evidence showing that the fee has any discriminatory impact on out-of-state charities. As the Fourth Circuit found, all charities generating the same amount "in nationwide contributions are subject to the same registration fee, without regard to location." (App. 8a-9a.)

Moreover, the courts below found the sliding-scale fee is justified because the State sustains higher costs in registering, reviewing and monitoring larger charities such as CAS than it does for smaller charities. (*See* App. 8a; 19a-20a and n.4). Maryland's registration fee is not unconstitutional merely because a registered charity that imposes such costs on the State has chosen not to solicit much business in Maryland. *See Massachusetts v. United States*, 435 U.S. at 468 n. 23 ("The analogous decision is *Clyde Mallory Lines v. Alabama ex rel State Docks*

Comm'n, 296 U.S. 261, 56 S.Ct 194, 80 L.Ed. 215 (1935), in which the Court held that a vessel that has not been the recipient of any police services could be required to pay a charge designed to defray their costs since the services redounded to the benefit of all vessels in the port."). Similarly, as the Fourth Circuit stated, while a "particular large charity may not generate higher costs, the Commerce Clause does not require that user fees be precisely correlated to actual use that a party makes of government services." (App. 8a) (*citing United States v. Sperry Corp.*, 493 U.S. at 60; *Evansville-Vanderburgh*, 405 U.S. at 716).

Notwithstanding CAS's claim that its sole contacts with Maryland "are by mail or common carrier" (Pet. at 13), it is undisputed that larger charities such as CAS impose greater regulatory costs in Maryland than do smaller charities. Thus, in contrast to cases such as *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), or *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), which involved the question of whether the States could tax out-of-state activity and did not address whether the States could be reimbursed for the costs they incur in protecting citizens from that activity, this is plainly not a case in which there is "no legitimate claim to impose 'a fair share of the cost of the local government.'" *National Bellas Hess*, 386 U.S. at 760 (*quoting Freeman v. Hewit*, 329 U.S. 249, 352 (1946)). The State is entitled to recover the significantly greater costs it incurs in registering and monitoring larger charities such as CAS, as CAS's self-described status as an out-of-state entity does not immunize it from state regulation. Simply put, the Commerce Clause does not "preclude a State from giving needful protection to its citizens in the course of their contacts with businesses conducted by outsiders when legislation by which this is

accomplished is general in scope, is not aimed at interstate or foreign commerce, and involves merely burdens incident to effective administration." *Union Brokerage Co. v. Jensen*, 322 U.S. at 212.

As CAS conceded in its brief below, "[t]here is no dispute that the State of Maryland has a substantial interest in protecting its citizens from fraud, nor that Maryland can subject charities that solicit in the state to reasonable regulation." Br. at 45. *Accord Village of Schaumburg v. Citizens For A Better Environment*, 444 U.S. 620, 632 (1980); *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 792 (1988). The Fourth Circuit correctly held Maryland's registration fee constitutes such a reasonable regulation. The Court of Appeals found that "[t]o protect and inform her citizens, Maryland must examine the overall activities of charities, not just the charities' activities that occur within Maryland." (App. 11a.) As an example, the Fourth Circuit discussed a hypothetical situation in which "a large national charity carefully uses 90% of the modest amount of funds it raises in Maryland for charitable purposes, but funnels 75% of the much larger amount of funds it raises nationwide for its directors' extravagant salaries." (App. 11a n.10.) The court found that "Maryland and her citizens surely have a legitimate interest in what this and other charities do with the funds they raise outside of Maryland." (*Id.*)

There is thus no merit in CAS's complaint that Maryland's fee violates the Commerce Clause because other States might follow Maryland and attempt to regulate CAS on the basis of its nationwide contributions, thus subjecting it to additional fees elsewhere. (Pet. at 19.) "There is a short answer to this claim, namely that the Commerce Clause does not prevent states from

charging for services they provide." *New Hampshire Motor Transport Association v. Flynn*, 751 F.2d 43, 50 (1st Cir. 1984). Addressing a similar objection made by the complaining airlines in *Evansville-Vanderburgh* "that a proliferation of these charges in airports over the country will eventually follow in the wake of a decision sustaining the validity of the Indiana and New Hampshire fees," 405 U.S. at 721, this Court dismissed the airlines' contention that "the total effect on the cost of air transportation could be prohibitive," *id.*, and held that the airlines could be required to pay "a fair share of the costs to the States of airports constructed and maintained for the purpose of aiding interstate air travel." *Id.* at 722.

The Court of Appeals' application of these well-elaborated principles was entirely correct. Further review of CAS's Commerce Clause claim is not warranted.

II. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S FIRST AMENDMENT CASES.

The petition also raises no substantial First Amendment claim deserving the exercise of this Court's discretionary jurisdiction. Indeed, the heart of CAS's argument is based on an incorrect premise: CAS erroneously contends that the fee is not narrowly tailored and violates First Amendment principles because "Maryland made no effort to ascertain the connection (if there is any) between the levels in the fee schedule and the state's regulatory costs." (Pet. at 12.) On the contrary, as set forth in the preceding section and as the Fourth Circuit found, "the record clearly shows" the State's costs of monitoring charities rise with the size of a charity's nationwide contributions. (App. 8a.) The court below correctly relied heavily on this undisputed fact in upholding Maryland's statute.

This Court has never questioned the right of the States to regulate conduct protected by the First Amendment by imposing fees "as a regulatory measure to defray the expenses of policing" that conduct. *Murdock v. Pennsylvania*, 319 U.S. 105, 114 (1943). *See also Forsyth County v. Nationalist Movement*, 112 S.Ct. 2395, 2405 (1992). Rather, the Court has specifically upheld the constitutionality of a fee found "to be 'not a revenue tax, but one to meet the expense incident to the administration of the [challenged] act and to the maintenance of public order in the matter licensed.'" *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941) (quoting district court decision). Relying on these decisions, the Fourth Circuit properly stated that "while the exercise of Constitutionally protected activities may not be taxed, it may be regulated, provided that the regulation is narrowly tailored to achieve a legitimate governmental interest, is content-neutral in terms and effect, and does not unduly burden speech." (App. 12a.) The Court of Appeals' application of these settled principles resulted in no constitutional error.

First, CAS makes no claim, nor could it claim, that Maryland's charitable solicitations statute "requires that the fee be based on the content of the speech." *Forsyth County v. Nationalist Movement*, 112 S.Ct. at 2403. On the contrary, as the Fourth Circuit stated, Maryland's scheme "is essentially similar to that upheld in *Cox*, and yet sharply different from the ordinance struck down in *Forsyth County*"; unlike the *Forsyth County* scheme, "Maryland licensing officials are afforded no discretion in imposing an appropriate fee . . . [and] cannot manipulate the Statute's fee discriminatorily in order to censor or limit a charity's First Amendment rights." (App. 13a.) Thus, the Fourth Circuit found that the statute is content-neutral, stating that "[c]harities

generating comparable levels of nationwide contributions are subject to the same fee, regardless of the nature of the causes espoused by a charity and regardless of the government's opinion of the causes." (App. 13a-14a.)

The Court of Appeals also found that, "[l]ike the fees imposed in *Cox*, the fees assessed by Maryland under the Statute are narrowly tailored to further a legitimate governmental purpose." (App. 14a.) This Court has recognized that a fee constitutionally may be "imposed as a regulatory measure and calculated to defray the expense of protecting . . . against the abuses of solicitors." *Murdock v. Pennsylvania* 319 U.S. at 116. Here, the Fourth Circuit found that Maryland's "fees enable the state to prevent fraud by charities soliciting funds in Maryland. As in *Cox*, the Maryland fees are calibrated to approximate the costs of administering the Statute, and the revenues raised by the fees do not exceed these costs." (App. 14a.)[7] That calibration is particularly

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[7] Thus, the lower courts found in this case that the State made the precise type of factual showing that was not made -- and thus proved fatal -- in cases that CAS claims (erroneously) conflict with the Fourth Circuit's decision. *See Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1205 (11th Cir. 1991) ("The only evidence in the record supporting the reasonableness of this [the challenged] charge" was a state official's "testimony that he telephoned transportation officials in other states who recommended that he charge a five-cent fee"); *Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050, 1056 (2nd Cir. 1983) (there was "no evidence that the administrative fee charged . . . to plaintiffs is equal to the cost incurred or to be incurred by defendants"); *Fernandes v. Limmer*, 663 F.2d 619, 633 n. 11 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982) (stating that the defendant "has not noted any support for its contention that the $6.00 fee is needed to defray the costs of operating the

(continued...)

fine-tuned in Maryland, as larger charities generating more administrative costs for Maryland officials pay a higher fee than do smaller charities giving rise to less work.[8]

Thus, the State's sliding-scale registration fee is constitutional because, as the Fourth Circuit found and as discussed above, "the Statute's sliding scale is narrowly tailored to match the costs incurred by Maryland in implementing the Statute. . . ." (App. 14a.) Maryland's fees bear a reasonable relationship to the actual costs incurred and are reasonably apportioned based on the workload generated by charities of different level of annual public contributions. The Fourth Circuit committed no error, therefore, warranting this Court's review in concluding that CAS's First Amendment rights

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[7](...continued)
permit system"); *South-Suburban Housing Center v. Greater South Suburban Board of Realtors*, 935 F.2d 868, 898 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 971 (1992) ("[T]he City failed to present any specific evidence of dollar figures reflecting either the revenue it generated from its sign permit fees or its costs in administering its sign regulations.").

[8] CAS contends that "the fee formula effective forces it to spend $200 to raise at most $2,000 from Maryland residents." (Pet. at 22.) In fact, CAS's complaint states that its annual public contributions from Maryland residents account for approximately $16,000. *See also* Pet. at 6. CAS's interrogatory answers similarly admitted that in Fiscal Years 1990-92, CAS received over $760,000 in public contributions nationwide, of which approximately $46,000 came from Maryland residents. CAS's assertion also ignores the fact that regardless of how little money CAS might actually solicit in any given year from Maryland residents, the State's monitoring costs for larger charities such as CAS are higher than they are for smaller charities.

have not been violated.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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March 6, 1995